SUPREME COURT, U. S.

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No. 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for
I.C.T. INSURANCE COMPANY,
Appellee.

On Appeal From the Supreme Court of Texas

SUPPLEMENTAL BRIEF OF APPELLANT MERCANTILE NATIONAL BANK AT DALLAS

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Appellant wishes to amplify the previous discussion of a question raised by a Justice at the first oral argument* herein, and briefly discussed at that time (part I, pp. 2-8 hereof). Also, since the first argument of this case in February, 1962, the Texas Supreme Court has handed down a decision pertinent to the contentions involved in this case, to which appellant wishes to refer (part II, pp. 8-10 hereof). This supplemental brief is accordingly submitted for consideration in conjunction with (and in no way superceding) its previous briefs filed herein before the previous argument.

*This Court heard oral argument in this case, as No. 90 in the October 1961 term, on February 28 and 29, 1962. In April, 1962, the case was restored to the calendar for reargument and placed on the summary calendar. 369 U.S. 834.

I. The Federal statute relating to venue of actions and proceedings against national banking associations was not repealed by federal legislation enacted in 1882 or by any later federal legislation.

Appellee has argued in its brief (Brief for the Appellee, pp. 26-28) and in oral argument that the Act of July 12, 1882 (22 STAT. 162), repealed the federal venue statute involved herein, 12 U.S.C. §94 (1940 ed.) (REV. STAT. §5198; 18 STAT. 320; 36 STAT. 1167). We have previously discussed some matters pertinent to this argument in our earlier briefs (Brief for the Appellant, pp. 42-45; Appellant's Reply Brief on the Merits, pp. 4-9). In view of the inquiry of a Justice at the argument as to our position with respect to this contention of appellee, we wish to amplify our previous discussion.

The statutory provision originally enacted as Section 57 of The National Bank Act (1864), 13 STAT. 116, provided:

> "[S]uits, actions and proceedings, against any [national banking] association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established; or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases. * * *."

This provision was re-enacted as a part of Section 5198 of the Revised Statutes, by the Act of February 18, 1875 (18 STAT. 320). It was included in the United States Code as 12 U.S.C. § 94 by the 1926 codifiers, and appears as such today.

The nature of the right granted under this statute to a national bank against whom a suit was brought in a state court was described by this Court as "a personal privilege that [a national banking association] could waive", and, again, as "a personal privilege, which it could claim or not, as it deemed necessary." *First National Bank v. Morgan*, 132 U.S. 141, 145 (1889).

The statute which appellee claims repealed the foregoing venue provisions is the proviso of Section 4 of the Act of July 12, 1882 (22 STAT. 163)—herein called for convenience "the 1882 Act"—which reads as follows:

> "[T]he jurisdiction for suits hereafter brought by or against any association established under any law providing for national-banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking associations may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

The 1882 Act was superceded by a provision contained in Section 4 of the Act of March 3, 1887 (24 STAT. 554)—herein for convenience called "the 1887 Act"—which provided in part:

> "[A]ll national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases

> the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State."

To correct the enrollment of the 1887 Act, Congress enacted an identical law, the Act of August 13, 1888 (25 STAT. 436), herein for convenience called "the 1888 Act".

Important to any consideration of the 1882 Act is the historical background and the then-existing situation, to which the legislation was addressed.

In *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809) this Court expressly recognized that under the United States Constitution Congress had the power to vest jurisdiction in inferior federal courts in cases coming properly within the description of "cases arising under the laws of the United States." In *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) this Court held that Congress had by express enactment vested this jurisdiction in federal courts as to the Second Bank of the United States, and that such legislation was constitutional. However, the Act of March 3, 1875 (18 STAT. 470) was the first general act by which Congress granted to lower federal courts general jurisdiction in "cases arising" under the laws of the United States. As a result of the grant in 1875 of this "federal question" jurisdiction, since national banks were created by Congress a suit by or against them was "necessarily a suit arising under the laws of the United States" and cognizable (if involving the $500 jurisdictional amount) in the federal courts. *Petri v. Com-*

mercial National Bank, 142 U.S. 644 (1892); see *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885). And, though the legislation described the federal jurisdiction which it conferred as being "concurrent with the courts of the several States," the statute provided for removal from state courts to federal courts of all "federal question" cases for which jurisdiction was therein established.

The important consequence of this legislation was, thus, that in all cases of $500 or more and involving national banks (1) the banks could for the first time commence in the federal court all actions in which they were plaintiffs; and (2) there was created a previously non-existent right of removal to the federal court of all state-court actions against national bank defendants whether diversity of citizenship existed between the parties or not.

This existing situation, by which national banks were enjoying, as a practical matter, exclusive federal jurisdiction in cases involving over $500, was the situation which led to the enactment of the 1882 Act, and was the state of affairs to which it was directed. There was no reason for the legislation to deal, and by its terms it did not deal, with state court venue of actions against national banks, under Section 57 of the National Bank Act (1864) or the reenactment thereof in Rev. Stat. § 5198.

We note at the outset that nothing in the 1882 Act purports in express terms or by implication to repeal Rev. Stat. § 5198, except insofar as Rev. Stat. § 5198 might have been

interpreted to provide for federal court subject-matter jurisdiction broader (for instance, by not providing a jurisdictional amount) than the subject-matter jurisdiction applicable to all corporations whether federally-created or not. Section 5198 created a waivable venue privilege, which a defendant national bank "could claim or not, as it deemed necessary." *First National Bank v. Morgan*, 132 U.S. 141, 145 (1889). Such a venue privilege is to be distinguished completely from a non-waivable pre-requisite concerning "jurisdiction". The 1882 Act refers solely to "jurisdiction of suits hereafter brought by or against national banks," the phrase appearing twice therein; the statute itself indicates a subject matter quite unrelated to the venue provisions of Rev. Stat. § 5198. Lastly, it is to be noted that Rev. Stat. § 5198 relates to venue of "suits, actions and proceedings *against*" national banking associations, in federal *and* state courts, whereas the 1882 Act was concerned with federal court jurisdiction only, but of suits *by and against* national banks, suits *by* national banking associations not having been dealt with by Rev. Stat. § 5198.*

The 1882, 1887 and 1888 Acts have been treated as relating to federal court jurisdiction, since their enactment. The material parts of the legislation were carried forward as paragraph 16 of § 24 of Chapter Two of the Judicial Code of 1911. 36 STAT. 1092. Said Chapter Two is headed "District Courts—Jurisdiction". The same statutory provisions are carried forward as § 1348 of the Judicial Code of 1948, similarly headed.

*Emphasis ours throughout.

We have found five principal decisions of this court concerned with the application of the 1882, 1887 and 1888 Acts:

Leather Manufacturers' Nat. Bank v. Cooper, 120 U.S. 778 (1887);

Whittemore v. Amoskeag National Bank, 134 U.S. 527 (1890);

Petri v. Commercial National Bank, 142 U.S. 644 (1892);

Continental National Bank v. Buford, 191 U.S. 119 (1903);

Hermann v. Edwards, 238 U.S. 107 (1915).

The *Amoskeag Bank* case involved the original jurisdiction of the federal courts, the others the removal jurisdiction. None of these decisions dealt with the specific question of whether the 1882 Act in any way affected the venue provisions of The National Bank Act of 1864 and Rev. Stat. § 5198.

It is plain, however, from all these decisions that the sole purpose, aim, and effect, of the 1882, 1887 and 1888 Acts was to eliminate federal court jurisdiction of actions by and against national banks, insofar as based on the federal-origin theory of federal questions as expounded in *Osborn v. Bank* and authorized by the federal-question jurisdiction statute of 1875. The correctness of the analysis to this effect, which we have set forth above, is strongly suggested by this Court's decision in *Petri v. Commercial*

National Bank. And it is virtually confirmed explicitly by this Court's decision in *Continental National Bank v. Buford*, wherein it was said (191 U.S. at 123-124):

> "The necessary effect of this legislation was to make national banks, for purposes of suing and being sued in the circuit courts of the United States, citizens of the states in which they were respectively located, and to withdraw from them the right to invoke the jurisdiction of the circuit courts of the United States simply upon the ground that they were created by, and exercised their powers under, acts of Congress. *No other purpose can be imputed to Congress than to effect that result.*" [Citing *Ex parte Jones*, 164 U. S. 691 (1896)].

Analysis of the statutes now embodied in 12 U.S.C. § 94, and of the 1882, 1887 and 1888 Acts, in terms of the language employed in the statutes themselves, the purposes to which they were directed, and their subsequent treatment and interpretation by this Court and the draftsmen of the Judicial Codes of 1911 and 1948—all demonstrate that appellee's argument for repeal in 1882 of the state venue provisions now appearing in 12 U.S.C. § 94 is insupportable.

II. The Texas Supreme Court has now held that the Texas statute involved in the present case provides only for permissive venue. That decision destroys any basis for appellee's "local action" argument herein.

Appellee has argued to the effect that the Texas statute, Section 4 (f) of Article 21.28 of the Insurance Code of Texas, *required* that "suits by or against the Liquidator-Receiver be instituted in the Court of competent jurisdiction of the County in which the delinquency proceeding" is pending (Appellee's Brief, pp. 28-34, 13-16). From these

arguments appellee reached the forced conclusion that by reason of the Texas statute his action was a "local action" to which the provision of Rev. Stat. § 5198 (12 U.S.C. § 94) was not applicable under *Casey v. Adams*, 102 U.S. (12 Otto) 66 (1880).* Such contention was repeated in appellee's oral argument in February 1962, and at that time reference was made to a case then pending before the Texas Supreme Court in which it would expressly construe and apply the Texas statutory provision contained in Section 4 (f) of Article 21.28 of the Insurance Code of Texas, the Texas statute on which appellee based his arguments relating to this matter.

In June, 1962 the Texas Supreme Court decided the case to which appellee referred. *Langdeau v. Burke Investment Company*, 358 S.W.2d 553 (1962).** That decision became final when rehearing was denied July 25, 1962. The Texas Supreme Court's holding to the effect that the Texas statute merely provides for permissive venue of suits by and against the insurance receiver-liquidator refutes completely appellee's argument that the case at bar is a "local action" under *Casey v. Adams*.

Burke Investment Company as plaintiff had sued the receiver in a state district court in Bexar County, Texas at San Antonio. The receiver contended that by reason of the provisions of Section 4 (f) of Article 21.28 of the Insurance Code of Texas, which he there (as here) asserted

*Discussed in our opening brief, p. 34; and our reply brief, pp. 9-12.
**Not yet officially reported.

was mandatory, the case was required to be transferred to the state district court in Travis County, Texas in which the delinquency proceeding against the insurer was pending. The trial court at San Antonio denied receiver Langdeau's contention. In upholding this action the Texas Supreme Court commented as to Section 4 (f):

> "It does not provide that the actions mentioned therein shall or must be brought in the county where the receivership is pending. Venue to hear and determine the proceedings is conferred upon the courts of that county, but there is nothing to suggest that the lawmakers intended for such courts to have exclusive venue of all suits by or against the receiver. Exception 28a, which contains language of similar import, has been held to be permissive and not mandatory. *Mutual Fire & Automobile Ins. Co. v. Kirkman*, Tex. Civ. App., 231 S.W.2d 459 (no writ). As pointed out by the court in that case, a declaration that 'venue shall lie' in a certain county is not equivalent to a command that the suit 'must be brought' in that county. It merely signifies an intention to give the plaintiff the legal right, if he chooses, to maintain such a suit there. This, it seems to us, is the meaning which should be attributed to the provisions of Section 4 (f)."

358 S.W.2d at 554-555.

In its opinion in the case at bar the Texas Supreme Court expressly stated that it was not passing on the question of whether or not the receiver's action herein is a "local action". (R. 396) Now in *Langdeau v. Burke Investment Company* the Texas Supreme Court has plainly decided that the Texas statute on which appellee based his arguments did not create a "local action", even as that term is defined in the argument of appellee.

CONCLUSION

In the present case there is a state statute relating to venue and a federal statute on the same subject. The Texas Supreme Court concluded that "this is a matter where the state is exercising powers wholly within the domain of state interest, and is, therefore, insulated from federal judicial review as well as the application of federal venue statutes." (R. 369) By this sweeping generalization the Texas Supreme Court would simply eliminate the application of—or even judicial review relating to the application of—the Supremacy Clause of the Constitution of the United States.

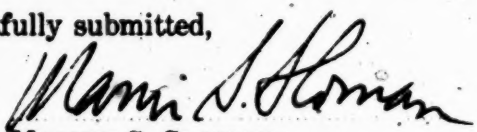
A comparable problem was involved in the recent case of *Free v. Bland*, 369 U.S. 663 (1962), wherein this Court held in language literally applicable to the case at bar:

> "The Supreme Court of Texas's interpretation of the Supremacy Clause is not in accord with controlling doctrine. The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. Article 6, Clause 2. This principle was made clear by Chief Justice Marshall when he stated for the Court that any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law, must yield. *Gibbons v. Ogden*, 9 Wheat. 1, 210, 211."

In the case at bar the Supremacy Clause of the Constitution of the United States requires that the federal venue statute here involved must prevail over the Texas venue statute.

For the reasons stated by appellant herein, and in appellant's prior briefs, the judgment of the Texas Supreme Court herein should be reversed, and the cause should be remanded with a direction that the Texas Supreme Court order transfer of appellee's action against appellant to a state civil district court in Dallas County, Texas.

Respectfully submitted,



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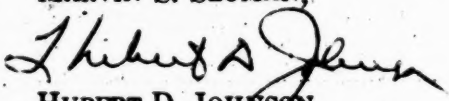

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PROOF OF SERVICE

I, Marvin S. Sloman, one of the attorneys for Mercantile National Bank at Dallas, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on November 28, 1962, I served copies of the foregoing brief of appellant on the appellee by depositing the same in a United States mail box, with first class postage prepaid, addressed to counsel of record for appellee at the following post office addresses:

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